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In The
Supreme Court of the United States

COMMONWEALTH OF
MASSACHUSETTS, ET AL.,

Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF THE STATES OF ARIZONA, IOWA, MARYLAND, MINNESOTA, AND WISCONSIN, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

AMY J. WILDERMUTH*
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE
OF LAW
332 South 1400 East,
Room 101
Salt Lake City, UT 84112
(801) 581-6833

SANNE H. KNUDSEN
FAEGRE & BENSON, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

TERRY GODDARD
Attorney General of Arizona
PAULA S. BICKETT
Chief Counsel, Civil Appeals
JOSEPH P. MIKITISH
Assistant Attorney General
1275 West Washington Street
Phoenix, AZ 85007
(602) 364-3319

Counsel for Amicus Curiae

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

THOMAS J. MILLER
Attorney General of Iowa
1305 East Walnut Street
Des Moines, IA 50319
(515) 281-5166

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

MIKE HATCH
Attorney General of
Minnesota
PETER MARKER,
Manager, Environmental
Protection Division
900 Bremer Tower
445 Minnesota St.
St. Paul, MN 55101
(651) 296-7341

PEGGY A. LAUTENSCHLAGER
Attorney General of
Wisconsin
THOMAS J. DAWSON
Assistant Attorney General
and Director, Environmental
Protection Unit
17 West Main Street
Madison, WI 53707
(608) 266-1221

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INTEREST OF AMICI CURIAE

Amici are the States of Arizona, Iowa, Maryland, Minnesota, and Wisconsin, all of which are concerned about the effects of climate change on their sovereign interests. In particular, the issue of the proper federal response to climate change is of great interest and importance to the Amici States as that response has a significant effect on their land, waters, and resources.

Equally important to Amici States is ensuring that they will have Article III standing to bring suit in federal court when federal agencies make decisions, such as the one at issue here, that potentially preempt their state law. Such decisions injure the States by preventing them from creating or enforcing their sovereign law, and States should be able to seek redress for those injuries by challenging federal administrative decisions in federal court.

For example, Arizona's interest in this issue is highlighted by Arizona Governor Janet Napolitano's recent Executive Order, which established a statewide Climate Change Advisory Group to make recommendations to reduce emissions associated with climate change in Arizona, "recognizing Arizona's interests in continued growth, economic development and energy security." Ariz. Exec. Order No. 2005-02, at 1 (2005). The Executive Order requires the development of a Climate Change Action Plan because "Arizona and other Western States have particular concerns about the impacts of climate change and climate variability on our environment, including the potential for prolonged drought, severe forest fires, warmer temperatures, increased snowmelt, reduced snow pack, and other effects." *Id.* at 1. The Advisory Group completed a statewide emissions inventory which demonstrated that the

transportation sector was the leading contributor to emissions of climate change pollutants. Arizona Climate Change Advisory Group, *Final Arizona Greenhouse Gas Inventory and Reference Case Projections 1990–2020* (2005). The Advisory Group has recommended to the Governor various measures, including adoption of the State Clean Car Program promulgated in California, to reduce emissions of climate change pollutants. Arizona Climate Change Advisory Group, *Climate Change Action Plan* 68-69 (2006).

In 1996, the State of Iowa prepared the Iowa Greenhouse Gas Action Plan, including a baseline inventory of emissions of pollutants associated with climate change for 1990. Iowa Dep't of Nat. Resources, *Iowa Greenhouse Gas Action Plan and Appendix B Inventory of Iowa Greenhouse Gas Emissions for the Year 1990* (1996). The 1996 Action Plan recommended several measures to reduce emissions of those pollutants, including reduction of emissions from transportation sources. *Id.* at 34-49. In 2005, Iowa Governor Thomas J. Vilsack issued Executive Order No. 41 which recognized that "a reduction in the use of energy from fossil fuels will have significant benefits for the health of Iowa's citizens and our environment by reducing . . . greenhouse gases." The Governor's order required all state agencies to take several measures to reduce emissions, including reduction of emissions from state-owned vehicles.

In addition, Iowa is a plaintiff in a public-nuisance action against the top five carbon dioxide emitters in the United States. *Connecticut v. American Elec. Power Co.*, No. 05-5104 CV (2d Cir.) (appeal pending). In general, Iowa is concerned with the impacts of climate change including, for example, increased frequency and duration

of summertime heat waves threatening the public health, reducing crop yields, reducing livestock weight gain and milk production, and increasing production costs for confinement animal feeding operations; and increased frequency of intense summertime rainfall events resulting in crop loss, property damage, and increased insurance claims.

The State of Maryland has begun to investigate the impact of global climate change on the Chesapeake Bay, its tributaries and its shoreline. With over 4,000 miles of coastline, Maryland is concerned about the effects of global climate change on its wetlands, fisheries, birds, pollutant loadings, and loss of land due to sea level rise. Over thirty percent of Maryland's coastline undergoes some degree of erosion, which is projected to increase due to climate change from one foot every 100 years to two to three feet by 2100. Joint Global Change Resources Institute, *Climate Change Impacts: Maryland Resources at Risk* (2002). Consistent with the findings of other states, transportation and electrical generation are the largest sources of climate changing emissions. Maryland estimates that at least one-third of the state's carbon dioxide emissions come from the transportation sector. *See Maryland Greenhouse Gas Emissions Inventory 1990* (2001).

To begin to address these climate change impacts, a 2006 Maryland law, the Healthy Air Act, requires Maryland to join the Regional Greenhouse Gas Initiative (RGGI), an effort by several Northeastern states to reduce emissions of carbon dioxide from power plants through a regional cap and trade program. In the event that RGGI is unsuccessful, the Act requires the compilation of a State climate action plan as an alternative.

The State of Minnesota has prepared a Climate Change Action Report, in which it notes that "[t]he effects

of global climatic change in Minnesota probably will involve substantial warming, particularly in winter, and possibly increased precipitation. . . . It is thought likely that the incidence of heavy rainfall events will increase, continuing trends in the U.S. of the past fifty years. This suggests a possible increase in flooding and, paradoxically, greater likelihood of drought in summer as more moisture runs off and less is stored in soils." Minnesota Pollution Control Agency, *Minnesota Climate Change Action Plan: A Framework for Climate Change Action* 3 (2003). The Minnesota plan notes that "[t]ransportation and electrical generation are the largest sources of emissions in Minnesota," accounting for seventy percent of its emissions of pollutants associated with climate change. *Id.* at 4. Minnesota's plan makes several recommendations to reduce emissions, and, of particular interest here, highlights programs that reduce emissions from motor vehicles. *Id.* at 137.

The State of Wisconsin has a longstanding interest in the climate-change issue at the heart of this case. *See generally* Wisconsin Department of Natural Resources, *Global Issues*, at http://www.dnr.state.wi.us/org/aw/air/global/global.htm. In 1994, the Wisconsin Department of Natural Resources (WDNR) established a Climate Change Committee to develop a strategic plan specifying the actions Wisconsin should take to address climate-change issues. The WDNR subsequently adopted the Committee's proposal, titled "Wisconsin Climate Change Action Plan," which is available at http://dnr.wi.gov/org/aw/air/global/wiccap.pdf. *See also* WDNR, *Warming Trends: What global climate change could mean for Wisconsin*, Wisconsin Natural Resources Magazine (Apr./May 2000) (supplement to print publication), *available at* http://www.wnrmag.com/

supps/2000/apr00/global.htm. Wisconsin has inventoried emissions from pollutants associated with climate change, *see* Sara Kerr, WDNR, Bureau of Air Mgmt., *Wisconsin's Greenhouse Gas Emissions, Trends from 1990 to 2000* (2004), *available at* http://dnr.wi.gov/org/aw/air/global/global.htm, and commissioned the *Wisconsin Greenhouse Gas Emission Reduction Cost Study*, *available at* http://dnr.wi.gov/org/aw/air/global/ghgstudy.htm. Wisconsin also created the Wisconsin Voluntary Emission Reductions Registry Advisory Committee (http://dnr.wi.gov/org/aw/air/hot/climchgcom), which led to legislation creating the Wisconsin Voluntary Emission Reduction Registry (http://dnr.wi.gov/org/aw/air/registry/index.html) under Wis. Stat. § 285.78 and Wis. Admin. Code ch. 437. Finally, along with Iowa, Wisconsin is also a plaintiff in the public-nuisance action against the top five carbon-dioxide emitters in the United States. *See Connecticut v. American Elec. Power Co.*, No. 05-5104 CV (2d Cir.) (appeal pending).

STATEMENT

The Amici States have a unique interest in the federal response to climate change because that response will have a significant effect on the impact of climate change on state resources. In short, there likely will be greater emissions of climate change pollutants if emissions are regulated State-by-State rather than by the federal government. As a result, the effects of climate change on each State's land, waters, and other assets may well be exacerbated.

But the harm caused by the Environmental Protection Agency's (EPA's) decision goes beyond leaving States to

their own devices with respect to climate change. The EPA's decision further harms States because any attempts by the States to regulate emissions of climate change pollutants from motor vehicles – the second largest source of such emissions – could be and indeed have been challenged as preempted based on the EPA's decision.

I. Procedural History

On October 20, 1999, several parties petitioned the EPA to regulate emissions of certain pollutants associated with climate change – carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbons (HFCs) – from new motor vehicles and engines under Section 202 of the Clean Air Act (CAA), 42 U.S.C. § 7521 (2006). Specifically, the petition asserted that the emissions of these pollutants by motor vehicles "may reasonably be anticipated to endanger public health or welfare" within the meaning of Section 202(a)(1) of the CAA because of their effects on the climate.

On September 8, 2003, the EPA denied the petition. The agency first asserted that "the CAA does not authorize regulations to address global climate change." Notice of Denial of Petition for Rulemaking, Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,924 (Sept. 8, 2003). In support of its contention, the EPA claimed that "Congress was well aware of the global climate change issue when it last comprehensively amended the CAA in 1990," *id.* at 52,926, but it "did not authorize regulation under the CAA to address global climate change," *id.* at 52,927. Based on its interpretation of Congress's actions with respect to the Act as well as enactments such as the Energy Policy and Conservation

Act – which assigns the creation of fuel economy standards to the Department of Transportation – the EPA concluded that

> Congress sought to develop a foundation for considering whether future legislative action on global climate change was warranted and, if so, what that action should be. From Federal agencies, it sought recommendations for national policy and further advances in scientific understanding and possible technological responses. It did not authorize any Federal agency to take any regulatory action in response to those recommendations and advances.

Id. at 52,927.

In addition, the EPA noted that even if it did have authority to regulate these pollutants under Section 202, it would not set standards for those pollutants. In support of its decision not to set standards, the EPA cited several considerations, including "scientific uncertainties," *id.* at 52,930, existing voluntary programs designed to reduce emissions of pollutants associated with climate change, *id.* at 52,931-33, and "important foreign policy considerations," *id.* at 52,931. It did not apply the statutory standard in Section 202(a)(1), which requires the agency to set standards for emissions from new vehicles or new engines of those pollutants that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

On a petition for review of the EPA's decision, Judge Randolph of the United States Court of Appeals for the D.C. Circuit, writing the lead opinion for the panel, did not reach the issue of whether the EPA had authority to regulate the pollutants associated with climate change.

Massachusetts v. Environmental Protection Agency, 415 F.3d 50, 56 n.1 (D.C. Cir. 2005). Instead, he concluded that the EPA acted properly when declining to issue standards under Section 202. *Id.* at 58.

Judge Sentelle joined in the judgment, but only after first concluding that the Petitioners had not demonstrated injury sufficient to establish Article III standing to bring their challenge. *Id.* at 59-60. Judge Sentelle's view was that Petitioners "have alleged and shown no harm particularized to themselves," *id.* at 60, and therefore did not state an injury sufficient for Article III purposes. *Id.* at 59-60.

In dissent, Judge Tatel disagreed with both Judge Sentelle's assertion that Petitioners had failed to show a sufficiently particularized injury, *id.* at 64-66, and Judge Randolph's conclusion that the EPA had acted properly in denying the petition. Judge Tatel explained that, in his view, the EPA had the authority to regulate emissions of the pollutants associated with climate change, *see id.* at 67-74, and its refusal to regulate those emissions was not based on the statute and therefore was improper, *id.* at 74-82.[1]

[1] The argument made in this brief in support of Petitioner States' standing to bring this suit was presented to the United States Court of Appeals for the D.C. Circuit in a letter submitted to that court pursuant to D.C. Circuit Rule 28(j). *See* Letter from Marc Melnick, Counsel for Petitioner State of California, to Mark J. Langer, Clerk, United States Court of Appeals for the D.C. Circuit (Apr. 4, 2005).

II. State Efforts to Regulate Motor Vehicle Emissions of Climate Change Pollutants

Under Section 209 of the Clean Air Act, no State except for California is permitted to set emissions standards for motor vehicles. *See* 42 U.S.C. § 7543(a). California may adopt its own standards so long as those standards are no less protective of public health than federal standards and it applies for a waiver of preemption from the EPA. *See* 42 U.S.C. § 7543(b). One factor the EPA is to consider in determining whether to grant a waiver is whether California's standards are consistent with Section 202(a), the section under which the EPA was asked to act in this case.

While the matter at issue in this case was pending, in July 2002, the California legislature passed and its Governor signed into law Assembly Bill 1493, which has been codified at Section 43018.5 of the California Health & Safety Code. That law requires the California Air Resources Board (CARB) to develop "regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles." Cal. Health & Safety Code § 43018.5(a) (2006). In September 2004, CARB approved regulations that set limits on the emission of climate change pollutants from new motor vehicles sold in California beginning with the 2009 model year. *See* Cal. Code of Regs. tit. 13, §§ 1900, 1961, 1961.1 (2005). On December 21, 2005, California requested a waiver from the EPA as required under Section 209(b). *See* Letter from Catherine Witherspoon, Executive Officer, CARB, to Stephen L. Johnson, Administrator of EPA (Dec. 21, 2005), *available*

at http://www.arb.ca.gov/cc/docs/waiver. pdf. To date, the EPA has not ruled on California's request.

Section 177 of the Clean Air Act allows other States to adopt California motor vehicle standards so long as those standards are identical to California's. *See* 42 U.S.C. § 7507. After California adopted its emissions standards, ten States adopted California's standards: Connecticut, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *See* Conn. Agencies Regs. § 22a-174-36b (2006); 06-096-127 Me. Code R. § 127 (2006); 310 Mass. Code Regs. 7.40 (2006); N.J. Admin. Code § 7:27-29 (2006); N.Y. Comp. Codes R. & Regs. tit. 6, § 218-8 (2006); Or. Admin. R. 340-257-0100 (2006); 25 Pa. Code §§ 126.411-412 (2006); R.I. Low Emission Vehicle Program, Air Pollution Control Reg. No. 37 (2006); Vt. Air Pollution Control Regs., Subch. XI and App. F (2006); Wash. Admin. Code 173-423-010 (2006).

In December 2004, a group of car manufacturers sued the State of California, arguing that its climate change emissions regulations were preempted on a variety of grounds, including the EPA decision at issue in this case. *See* First Amended Compl., *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04-cv-06663-REC-LJO (E.D. Cal. Feb. 16, 2005), ¶¶ 9(b), 47-51, 122-23.[2] Section 209(b), the California exemption provision, requires that any standard adopted by California be "consistent with" Section 202(a). 42 U.S.C. § 7543(b). Because the "EPA authoritatively concluded . . . [that] carbon dioxide is not a 'pollutant' under [S]ection

[2] All complaints referenced in these brief are available from the Public Access to Court Electronic Records (PACER) service. *See* http://pacer.psc.uscourts.gov/.

202(a) and cannot be regulated under [S]ection 202(a)," plaintiffs maintain that California cannot adopt standards that regulate carbon dioxide emissions, which would be inconsistent with the EPA's interpretation of Section 202 in the decision under review here. *Id.* at ¶ 51.

Similar lawsuits have been filed in two States that adopted the California standards, Rhode Island and Vermont, and they too include claims of preemption based on the EPA's decision. See Compl., *Ass'n of Int'l Auto. Mfrs. v. Sullivan*, No. 1:06-cv-00069-T-LDA (D.R.I. Feb. 13, 2006); Compl., *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Torti*, No. 2:05-CV-302 (D. Vt. Nov. 18, 2005). In the Vermont action, plaintiffs have asserted that the "authoritative determination by EPA [at issue here] precludes any State from adopting any new motor vehicle emissions standards for" pollutants associated with climate change. *See* Compl., *Green Mountain Chrysler-Plymouth-Dodge-Jeep v. Torti*, ¶ 105. The Rhode Island complaint, taking a somewhat different tack, asserts that the California regulations do not satisfy the statutory requirements for the exception to preemption because, among other things, carbon dioxide "is not 'an air pollutant' subject to regulation under Section 202(a) of the CAA" given the EPA's decision and therefore the California regulations are "not 'consistent with [S]ection 202(a)' of the CAA." Compl., *Ass'n of Int'l Auto. Mfrs.*, ¶ 47; *see id.* ¶ 27.

SUMMARY OF ARGUMENT

Petitioners have asked this Court to determine whether the EPA acted properly in denying a rulemaking petition to regulate carbon dioxide and other pollutants

associated with climate change under Section 202 of the CAA. Specifically, Petitioners contend that the EPA improperly concluded that it was without authority to regulate motor vehicle emissions of climate change pollutants, and that the EPA exceeded its statutory authority under Section 202 by considering factors outside those permitted under the statutory mandates. They have asked this Court to reverse the judgment of the Court of Appeals so that the agency can consider the issues based on the proper statutory factors.

For the reasons provided by Petitioners, the Amici States agree that the EPA acted improperly in concluding that it was without authority to regulate emissions of climate change pollutants from motor vehicles, and that the EPA failed to properly consider the statutory factors in making its decision. Before reaching those merits issues, however, Amici States urge the Court not to be diverted from the questions presented in this case by concerns over Petitioners' standing since Petitioner States have standing to bring this suit for at least two reasons.

First, as Judge Tatel concluded below, *see* 415 F.3d at 64-66, the Petitioner States are likely to suffer and incur the costs of several effects of climate change, which include everything from loss of unique state lands and unique sources and bodies of water within each State, to particular damages resulting from weather-related disasters that each State is likely to suffer. *See* Br. of Petrs. at 5-6 ("effects include . . . inundation of an appreciable portion of coastal States' territory; damage to publicly owned coastal facilities and infrastructure; additional emergency response costs caused by more frequent and intense storm surges and floods; and shrinking water

supplies due to reduced snowpack" (footnotes omitted)). The EPA's decision not to regulate motor vehicle emissions of pollutants associated with climate change exacerbates the damages to each State resulting from climate change because, even if not preempted from taking action, States are, at best, only able to regulate the limited number of emissions sources within their borders. The EPA's authority to regulate nationwide would provide for more effective regulation of emission sources, which would in turn likely lessen the States' losses.

The second ground on which to find standing, which is the central focus of this brief, is that Petitioner States are harmed by the EPA's decision because it intrudes on their sovereignty by subjecting them to claims that they are prevented from regulating motor vehicle emissions as the CAA permits. States have a sovereign interest when the federal government limits their ability to create and enforce their own laws. Although the federal government has the "undoubted power" to trump state law in many instances, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 887 (2000) (Stevens, J., dissenting), the CAA reflects a respect for state sovereignty with regard to motor vehicle emissions standards. In particular, Section 209 allows California to set its own motor vehicle emissions standards so long as those standards are at least as protective as federal standards and are, among other things, consistent with Section 202(a) of the CAA. 42 U.S.C. § 7521(a). In addition, Section 177 allows other States to adopt standards identical to California's. 42 U.S.C. § 7507.

California has adopted motor vehicle standards limiting emissions of climate change pollutants, and other States have adopted those standards as the CAA allows. In several pending cases, however, plaintiffs have asserted

that those standards are preempted by the EPA's decision. In particular, plaintiffs claim that if the EPA is without authority to regulate emissions of pollutants associated with climate change from motor vehicles, California likewise cannot regulate them. The EPA's decision therefore has and will continue to lead to the concrete claims of preemption against States with respect to their efforts to deal with emissions related to climate change, and those concrete claims threaten the States' ability to create and enforce their own law. If this Court were to reverse the judgment of the Court of Appeals – as requested by Petitioners – the EPA's decision would no longer have any preemptive effect. Accordingly, the Court should conclude that the Petitioner States have standing to bring this suit.

ARGUMENT

"States have an interest, as sovereigns, in exercising 'the power to create and enforce a legal code.'" *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)). When an administrative agency makes a decision that has the potential to preempt state law, States affected by that decision have the requisite Article III interest and injury for the purposes of determining standing. *See id.*; *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974).

The Petitioner States have standing to bring this action because the EPA's decision not to regulate carbon dioxide and other pollutants associated with climate change under Section 202 has led to actual claims that California and the States that adopt California's standards

are precluded from doing so. Although Amici States do not believe that the underlying agency decision in this case preempts California's or any other State's ability to regulate motor vehicle emissions of carbon dioxide and other pollutants contributing to climate change, the injury that results from the claims is clear and distinct. Because these colorable claims of preemption interfere with the States' ability to create and enforce their own law, the injury to the States is actual and concrete, not fanciful, hypothetical, speculative, or conjectural.[3]

I. State Efforts to Regulate Emissions of Climate Change Pollutants Are Threatened by Claims of Preemption

State law can be preempted by federal regulations and other administrative decisions just as it can be preempted by federal statutes. *See Louisiana Public Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369 (1986) ("Pre-emption may result not only from action taken by Congress itself; a federal

[3] The plaintiffs in the California suit claim that California's regulations are also preempted by the federal fuel economy program, reflected in the corporate average fuel economy (CAFE) standards. *See* First Amended Compl., *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04-cv-06663-REC-LJO (E.D. Cal. Feb. 16, 2005), ¶¶ 112-18. But the fact that there may be other bases on which to claim that the California standards are preempted does not change the injury suffered by the States as a result of the EPA's decision, or the fact that those injuries will be redressed by a decision invalidating the EPA's action. If plaintiffs are correct with respect to the CAFE standards, the California standards would be preempted only to the extent that they impermissibly interfere with the CAFE standards. The preemption analysis of that claim is quite different from, and may have different results than, the analysis of the claim that California cannot set any motor vehicle emissions standards for climate change pollutants whatsoever as a result of the EPA's decision in this case.

agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."); *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

In general, federal administrative decisions might preempt state law in one of two ways. First, an agency may preempt state and local law by explicitly stating its intent to preempt in its decision. But "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority . . . [because] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Public Serv. Comm'n v. F.C.C.*, 476 U.S. at 374. In other words, in order to preempt, the agency cannot simply say it is so; Congress must expressly give the agency the authority to do so. *See City of New York v. F.C.C.*, 486 U.S. 57, 66-68 (1988).

An administrative decision might also preempt even where the agency has not explicitly stated its intent to do so, but only if the agency decision was within the authority granted to it by Congress and either it is "impossible for a private party to comply with both state and federal requirements," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990), or it stands "as an obstacle to the accomplishment and execution of" important federal objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). For example, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), an individual

was injured when his car collided with a tree. Consistent with the applicable safety regulation issued by the Department of Transportation, the car was not equipped with airbags or any other passive restraints. *Id.* at 865. The individual nevertheless brought a state tort claim against the car manufacturer claiming that the car was negligently and defectively designed because it was not equipped with a driver's side airbag. *Id.*

The Court concluded that the safety regulation promulgated by the Department of Transportation preempted the common law action that would have imposed a duty on the manufacturer to install an airbag because "the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices," *id.* at 875, and that range of choices would have been upset by a state-imposed requirement that the manufacturer must install an airbag, *id.* at 881. This was true, the Court held, notwithstanding the fact that the safety standard said nothing about preemption. *See id.* at 892 (Stevens, J., dissenting); *see also Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. at 156 (concluding that a regulation promulgated by the Federal Home Loan Bank Board, which permitted federally chartered savings and loan associations to exercise the due-on-sale clause of a mortgage, preempted the application of a contrary state doctrine).

It is also possible for an agency decision not to act to preempt state law. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (the Court has "recognized that 'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate'") (quoting *Ark.*

Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983)); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (state law is preempted "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute"). Relying on this principle, in *Ray v. Atlantic Richfield Company*, 435 U.S. 151, 178 (1978), the Court concluded that the agency's decision not to "promulgate a ban on the operations of oil tankers in excess of 125,000 [dead weight tons]" was the equivalent of ruling that no such regulation is appropriate, and thus the Washington state law that incorporated such a ban was preempted.

Like the decision in *Geier*, the EPA's decision in this case does not explicitly state its intent to preempt. And like *Ray*, the EPA's decision is effectively one to do nothing. It might therefore preempt the States' efforts to regulate climate change pollutants. In order to fully understand this potential conflict, however, we turn to the motor vehicle emissions provisions of the CAA.

In contrast to stationary sources, the CAA expressly preempts a State's authority to regulate emissions from certain mobile sources. In particular, Section 209(a) of the CAA prohibits States from regulating emissions from new motor vehicles. *See* 42 U.S.C. § 7543(a). Not all state regulation in this area is foreclosed, however; Section 209(b)(1) allows eligible States to apply for a waiver from federal preemption. *See* 42 U.S.C. § 7543(b)(1). As the only State eligible for such a waiver, California is the lone State with authority to regulate motor vehicle emissions. *See Motor Vehicle Mfrs. Ass'n v. N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 525-26 (2d Cir. 1994) (explaining in

detail the history of the CAA amendments and describing California's authority).

Other States, however, may "piggyback" onto California's exemption by adopting emissions standards identical to those implemented by California. *See* 42 U.S.C. § 7507; *see also Motor Vehicle Mfrs. Ass'n*, 17 F.3d at 525. Under this framework, California is effectively the gateway to the States' ability to adopt standards different from the federal standards for motor vehicle emissions. In this case, therefore, because the EPA has refused to regulate emissions of pollutants associated with climate change from motor vehicles, California's standards are the only ones available to the States that desire to regulate such emissions.[4]

Notwithstanding California's explicit exception to preemption under Section 209(b), the possibility of preemption remains, as California's history in the area of motor vehicle regulation amply demonstrates. Indeed, California's attempts to regulate motor vehicle emissions or motor fuels have come under fire in several preemption challenges with mixed results. *See, e.g., Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665 (9th Cir. 2003) (challenging California ban on methyl tertiary-butyl ether (MTBE) as a fuel additive; *Cent. Valley Chrysler-Plymouth v. Cal. Air Resources Bd.*, No. CV-F-02-5017, 2002 U.S. Dist. LEXIS

[4] This should not be understood to foreclose the possibility that the EPA's determination that the regulation of emissions of climate change pollutants are beyond the scope of its authority under the Clean Air Act might also place such regulation beyond the scope of the Section 209 prohibition. In that event, the States may not be preempted under that section from taking action with respect to emissions of climate change pollutants.

20403 (E.D. Cal. June 11, 2002) (granting preliminary injunction regarding California zero emissions vehicle quota regulations). In particular, the scope of the Section 209(a) prohibition has served as a successful basis for challenging at least one recent attempt to address mobile source emissions. In *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246, 252 (2004), this Court recently held that certain local regulations governing the purchase or lease of various vehicle fleets were preempted under Section 209(a). As is evident in these cases, resolving preemption challenges is not as clear cut as it might appear at first blush.

II. States Have Standing to Bring Suits When a Decision of a Federal Agency, Like the EPA's Decision Here, May Preempt Their State Law

In order to have standing to bring suit in federal court, a plaintiff must show that she has been injured, that her injury is traceable to the conduct of the defendant, and that a favorable decision will likely redress her injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

"[S]tates have standing to protect proprietary and sovereign interests." 13A Charles A. Wright et al., *Federal Practice and Procedure*, § 3531.11 (2006). Indeed, courts have long recognized that a State has standing to sue when it alleges an interest in preserving its sovereignty and that interest has been interfered with or diminished. *See, e.g., Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51 n.17 (1986). One such sovereign interest is "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. at 601; *see also Maine v. Taylor*, 477 U.S. 131, 137 (1986);

Diamond v. Charles, 476 U.S. 54, 65 (1986); *cf. Matter of Dunn*, 988 F.2d 45, 47 (7th Cir. 1993) (State had standing to appeal judgment holding one of its statutes preempted even if no other party seeks review).

In cases like this one, when administrative decisions have the potential to preempt state law and thus interfere with the State's interest in creating and enforcing its own legal code, States are injured, and it is the administrative decision that causes that injury. *See Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989); *Florida v. Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974). Moreover, if struck down, the administrative decision would have no preemptive effect, and thus a favorable decision by a court to grant a petition for review of that decision would redress the State's injury. *See Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, Nos. 05-11682, 05-12601, ___ F.3d ___, 2006 WL 2105992 (11th Cir. July 31, 2006) (concluding that regulations exceeded the authority delegated to the agency by statute and therefore did not preempt state law); *Wyoming v. Hoffman*, 423 F. Supp. 450, 453 (D. Wyo. 1976) ("[P]rior to the adoption of the challenged regulations the individual states controlled dredge and fill activities in those waters which now require Section 404 permits but which were not subject to traditional navigational servitudes. The federal government, as a result of the regulations, now assumes this authority. If a final determination finds the regulations are invalid, the State would regain its authority to regulate these activities. The State thus has a stake in the outcome which can only be decided by a determination as sought in the complaint.").

One central issue is determining when an agency decision presents a sufficient question of preemption for

the purposes of serving as an "injury in fact" under the Article III analysis. The injury, as the Court noted in *Lujan*, must be "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." 504 U.S. at 560.

On the one hand, it appears to be clear that a State could not rely on a frivolous or fanciful claim of potential preemption in order to claim injury. On the other hand, a State need not show preemption conclusively in order for an agency decision to give rise to a claim of injury. Rather, without disagreement, the circuit courts have long held that colorable claims of preemption are sufficient to serve as the basis for a State's Article III injury.

For example, in *Florida v. Weinberger*, the Secretary of the United States Department of Health, Education and Welfare promulgated a regulation regarding "what sort of a state licensing board for nursing home administrators will qualify for the Medicaid program. The major revision of the original definition alters it so that a board containing a majority of nursing home administrators will no longer pass muster." 492 F.2d at 490. Florida challenged the regulation, asserting that the Department was without statutory authority to pass such a regulation. *Id.* at 491. Florida claimed that it had standing to bring such a challenge because Florida's own law permitted a board containing a majority of nursing home administrators. *Id.* at 490. The court agreed with Florida and concluded that the State had standing because "[t]here is nothing abstract about this disagreement, and the Secretary has set a collision course with Florida law in a formal and final regulation which is backed by grave sanctions and which demands, if valid, immediate compliance." *Id.* at 492.

Likewise, in *Alaska v. U.S. Department of Transportation*, 868 F.2d at 443, twenty-seven States challenged advertising regulations promulgated by the Department of Transportation on the ground that the Administrative Procedure Act required that notice and comment procedures be employed when the regulations were promulgated, and the Department had failed to follow those procedures. When the Department questioned the States' standing to bring the action, the court concluded that the States had standing because the agency "claim[ed] that its rules preempt state consumer protection statutes." 868 F.2d at 443. It did not matter that the Department claimed that none of the States' laws would in fact prohibit what the contested regulation permitted. *See id.* Because the States had pointed to colorable claims of preemption based on the Department's decision, the States had standing to seek review. *Id.* at 444; *see also Ohio ex rel. Celebrezze v. U.S. Dep't of Transp.*, 766 F.2d 228, 232-33 (6th Cir. 1985) (concluding that Ohio had standing to seek judicial review of a federal regulation which claimed to expressly invalidate an Ohio state statute); *cf. Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 880 n.3 (D.C. Cir. 1983) (concluding that state government officials had standing to challenge regulation that preempted inconsistent state law).

Although this Court has never commented on this issue directly, it has on several occasions reached the merits of States' challenges to potentially preemptive agency decisions without noting any obstacle to the States' standing to bring such actions. This is true regardless of the ultimate outcome of the State's challenge. *See, e.g., New York v. F.E.R.C.*, 535 U.S. 1 (2002) (States challenged FERC order preempting local and state law regarding

unbundled retail transmissions; Court found for FERC); *Louisiana Public Serv. Comm'n v. F.C.C.*, 476 U.S. 355 (1986) (States sought review of FCC order that claimed to preempt state law; Court decided in favor of States). As such, the circuit court cases finding standing on the basis of colorable preemption claims are in accord with this Court's precedent.

In this case, just as in the *Weinberger* case, there is "nothing abstract," 492 F.2d at 492, about the injury to the States' sovereign interests resulting from the preemption claims asserted against them. As explained above, a claim of preemption based on the EPA's decision has already been asserted against the California standards. Likewise, the plaintiffs in cases filed against Rhode Island and Vermont assert preemption claims of those States' adoption of the California standards solely based on the EPA's decision. Accordingly, the injury here is not fanciful, hypothetical, or conjectural; it is concrete and actual.

Moreover, the preemption claims in these instances are colorable, not frivolous. Plaintiffs have asserted that Section 209(b) itself does not allow for an exception to preemption because the California's standards are not "consistent with" Section 202. *See* 42 U.S.C. § 7543(b)(1)(C). That is, plaintiffs claim that, the standards are not consistent with the EPA's decision under Section 202 that it is without authority to regulate emissions of climate change pollutants from motor vehicles. Although the Amici and Petitioner States disagree with the plaintiffs' interpretation of the relevant statutory provisions, and neither the Petitioner States nor the Amici States believe that the EPA's decision in this case preempts their efforts, the claims of preemption are not without legal basis.

Given these colorable and concrete preemption claims, there can be no doubt that Petitioners California, Vermont, and Rhode Island have suffered actual injury sufficient to give them standing. In addition, the EPA's decision is the cause of their injury, and the injury will be redressed if this Court grants Petitioners' request to reverse the judgment of the Court of Appeals because the EPA's decision would no longer have any preemptive effect. Accordingly, because the same relief is sought by all Petitioners and at least three Petitioners have standing to bring this suit, the Article III requirements have been satisfied. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 126 S. Ct. 1297, 1303 n.2 (2006) (noting that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement" and citing lower court's reliance on *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)).

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals concluding that the State Petitioners have standing under Article III to bring this suit should be affirmed and, for the reasons provided by Petitioners, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

AMY J. WILDERMUTH*
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE
OF LAW
332 South 1400 East,
Room 101
Salt Lake City, UT 84112
(801) 581-6833

SANNE H. KNUDSEN
FAEGRE & BENSON, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

TERRY GODDARD
Attorney General of Arizona
PAULA S. BICKETT
Chief Counsel, Civil Appeals
JOSEPH P. MIKITISH
Assistant Attorney General
1275 West Washington Street
Phoenix, AZ 85007
(602) 364-3319

Counsel for Amicus Curiae

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]